

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JUSTICE ENERGY, INC.

and

Case 09-CA-231106

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA (UMWA)

Zuzana Murarova, Esq.,
for the General Counsel.
Stephen Ball and Joshua Brown, Esqs.,
for the Respondent.
Kevin Fagan, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that Justice Energy, Inc. (Respondent) unlawfully modified the terms of a contract without the consent of the International Union, United Mine Workers of America (Union). Specifically, the General Counsel alleges that Respondent unlawfully: changed the bargaining unit's health insurance benefit plan; began paying bargaining unit employees by wire transfer and thereby caused some of those employees to incur wire transfer fees; and failed to issue bargaining unit employees pay statements with their pay. As explained below, I have determined that Respondent violated the National Labor Relations Act by making three contractual modifications without the Union's consent.

STATEMENT OF THE CASE

This case was tried in Beaver, West Virginia, on October 9 and 30, 2019. The Union filed the charge at issue here on November 15, 2018, and filed an amended charge on February 13, 2019.

The General Counsel issued a complaint on April 10, 2019, and issued an amended complaint on July 1, 2019. In the amended complaint the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) by: (a) on about February 20, 2018 (but not discovered by the Union until October 2018), failing and refusing to continue in effect the terms of the collective-bargaining agreement by, without the Union's consent, substantially and materially changing the bargaining unit's health insurance benefit plan; (b) in about June 2018, failing and refusing to continue in effect the terms of the collective-bargaining agreement by, without the Union's consent, commencing the practice of paying employees by wire transfer and causing some employees to incur wire transfer fees; and

(c) in about November 2018, failing and refusing to continue in effect the terms of the collective-bargaining agreement by, without the Union's consent, failing to issue employees a plain statement at the time employees received their paychecks. Respondent filed timely answers denying the alleged violations in the complaint and amended complaint.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Union and Respondent, I make the following

FINDINGS OF FACT²

I. JURISDICTION

Respondent, a corporation with an office and place of business in McDowell County, West Virginia, engages in the business of mining coal at its facility known as the Red Fox Mine.³ During the 12-month period preceding the filing of the unfair labor practices charge, in conducting its operations Respondent sold and shipped goods valued in excess of \$50,000 from its facility directly to points outside the state of West Virginia. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Collective-Bargaining Background*

1. International Union of the United Mine Workers of America

For several years, the Union has served as the exclusive collective-bargaining representative of employees in an appropriate bargaining unit at Respondent's facility.

¹ The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcript: p. 11, l. 3: "evidence" should be "events"; p. 228, l. 4: "every" should be "ever"; p. 291, l. 17: "em passe" should be "impasse"; p. 292, l. 8: "em passe" should be "impasse"; p. 313, l. 6: "ever bill" should be "every bill"; p. 246, ll. 6, 11: "Pullman" should be "Coleman"; p. 270, l. 14: "did" should be "didn't"; and pp. 289-290 (throughout): "causal" should be "casual." I also grant the General Counsel's unopposed motion to correct Joint Exhibit 3 such that paragraph 1 specifies a date of "June 28, 2018."

² Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

³ Respondent owns and operates Red Fox Mine and is a subsidiary of multiple entities, including: Bluestone Resources, Inc.; Bluestone Mineral, Inc.; and JCJ Coal Group, LLC. (Tr. 20, 166-168, 243, 298; GC Exh. 12.) During trial, witnesses occasionally referred to one of the parent entities in place of Respondent (such that a witness testifying about Respondent might say "Bluestone," "Justice Energy" or another variation). (See, e.g., Tr. 44-45, 72, 94.) To the extent that an entity besides Respondent is relevant to the issues at hand, I have identified that entity by name in this decision.

Bargaining unit employees are employees (excluding supervisors) that perform the following work:

5 The production of coal, including the removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by [Respondent]), repair and maintenance work normally performed at the mine site or at a central shop of [Respondent] and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above.

10 (Jt. Exh. 1, Article IA(a); see also Tr. 21-22, 129-130.) In successive collective-bargaining agreements, Respondent has recognized the Union as the exclusive collective-bargaining representative of the bargaining unit, with the most recent agreement (the National Bituminous Coal Wage Agreement (NBCWA) of 2016) being effective from August 15, 2016, through December 31, 2021. (Jt. Exh. 1; see also GC Exh. 4 (noting that Respondent and the Union also
15 agreed to the NBCWA of 2011).)

2. The 2015 memorandum of understanding

20 The NBCWA establishes terms and conditions of employment for the bargaining unit. To supplement or modify those terms, the Union and Respondent negotiate local memoranda of understanding.

25 On June 10, 2015, Respondent and the Union executed a memorandum of understanding that noted the parties' agreement to the terms of the NBCWA of 2011. In the memorandum, Respondent and the Union agreed to the following terms about health care:

30 Health care benefits shall be an 80/20 Plan as established in the attached "ein" Healthcare Plan [hereafter referred to as the EIN plan]. Classified employees shall not be required to pay any premiums toward their Healthcare coverage.

35 (GC Exh. 4, p. 1; Tr. 59, 64-65, 107-109, 114, 196-197, 303-304; see also Tr. 61-62, 65, 109 (noting that the bargaining unit ratified the 2015 memorandum of understanding); Tr. 48-49 (explaining that in an 80/20 plan the insurance provider covers 80 percent of the cost of medical treatment and the employee covers 20 percent).) The parties also attached a summary of health care benefits that would apply under the EIN plan, including but not limited to deductibles, copays and out of pocket maxima for various health care services. (GC Exh. 4, pp. 4-5; Tr. 62.)

3. The NBCWA of 2016

40 On August 15, 2016, the NBCWA of 2016 took effect, with both Respondent and the Union bound by that agreement (which, as noted above, is effective through December 31, 2021). The agreement included the following provisions:

45 Article XX - Health, Retirement and Other Benefits: [providing, among other things, pension, health and other benefits for employees covered by the agreement]; and

Article XXII(m) - Pay day: All Employees will be paid at least every two (2) weeks. Payment shall be made by cash or check with recognition for legitimate deductions. The discounting of earnings through the use of scrip or tokens is prohibited. The Employee shall receive, with his pay, a plain statement itemizing the number of hours worked during the pay period and, if practicable, setting forth the straight time, overtime and premium time hours worked during the pay period. The statement shall also itemize all payroll deductions.

(Jt. Exh. 1, pp. 125, 260-261; Tr. 22-24, 40-41, 129, 144, 146-147, 191-192, 279-281, 305.)

4. The 2016 memorandum of understanding

In or about November and December 2016, Respondent and the Union met to negotiate a new memorandum of understanding. The parties focused on wages as a primary issue during negotiations. To the extent that the parties addressed health care, the parties discussed having an 80/20 plan similar to the EIN plan. (Tr. 114-115, 120, 287-289, 299-302.)

On December 30, 2016, Respondent and the Union executed a memorandum of understanding that noted the parties' agreement to the terms of the NBCWA of 2016. (Jt. Exh. 2, p. 1.) In the memorandum, Respondent and the Union agreed to the following terms about health care (in pertinent part):

Justice Energy shall provide all active and laid off employees with a healthcare and prescription drug coverage plan as that which is established in the 2015 EIN 80/20 plan⁴ (see attachment).⁵ The Dental, Vision and Accidental Health and Dismemberment Plans shall be identical to those established in Article XX and Article XXA of the 2016 NBCWA.

(Jt. Exh. 2, p. 3; Tr. 24-26, 109-111, 114, 195-196, 305; see also Tr. 61, 111-112, 122-124 (noting that the bargaining unit ratified the 2016 memorandum of understanding).)

The 2016 memorandum of understanding specifies that it terminates on the same date as the NBCWA of 2016 (i.e., December 31, 2021), and specifies that there shall be a "re-opener" for wages and healthcare no later than 60 days before the anniversary date of the memorandum (December 30) each year. (Jt. Exh. 2, p. 1; Tr. 60.)

⁴ I do not credit Graham's testimony that the 2016 memorandum of understanding refers to the 2015 EIN 80/20 plan because the parties cut-and-pasted language from the 2015 memorandum of understanding. (See Tr. 289.) The two memoranda have different language about health care and the EIN plan, and I find that the parties intentionally wrote the health care language in the 2016 memorandum of understanding to reflect their agreement that Respondent would provide a health care plan like the EIN plan. (See Tr. 289 (Graham's testimony that the parties discussed "an 80/20 plan similar to the EIN plan").)

⁵ Although a summary of the 2015 EIN plan was available to the parties, the evidentiary record does not show that the parties actually attached a copy of the 2015 EIN plan summary to the copy of the 2016 memorandum of understanding that was circulated for signature. (R. Exh. 1; Tr. 118-120, 212, 293; see also Tr. 26-27, 115-117, 122-126.)

B. February 20, 2018 – Bargaining Unit Employees Return to Work

In late 2017 or early 2018, Respondent planned to reopen the Red Fox Mine and recall bargaining unit employees (who were on layoff status) to work. In connection with that development, Respondent proposed that the parties negotiate a new memorandum of understanding that, among other things, would modify employee wages and health care. The Union declined Respondent's proposed changes, prompting Respondent's representatives to state that Respondent would not reopen the mine and then walk out of one of the parties' meetings. Ultimately, however, the parties agreed that bargaining unit employees would return to work under the terms set forth in the 2016 memorandum of understanding (as well as the 2016 NBCWA). (Jt. Exhs. 1–2; Jt. Exh. 3, par. 4(e); Tr. 22–26, 30–33, 72, 112–113, 129–132, 154–156, 175; see also GC Exh. 2 (summary description of 2015 EIN plan).)⁶

Bargaining unit employees resumed work for Respondent at the mine on February 20, 2018. Consistent with the terms of the NBCWA of 2016, Respondent paid employees by check and provided (on pay days) each employee with a pay statement that described the employee's hours worked, gross pay, net pay and applicable deductions. Employees used their pay statements to verify that Respondent was paying them the accurate amount (since the number of regular hours and/or overtime that an employee worked each pay period could vary). (Tr. 41–42, 71–74, 96–97, 112; see also Jt. Exh. 3, par. 4(b) (noting that Respondent does not have any records showing when it provided employees with pay statements from this timeframe up to November 2018); Tr. 72, 85–87 (noting that at times Respondent used a third-party service to issue checks and statements to employees).)

C. March–May 2018 – Initial Problems with Health Insurance

1. Delay in setting up health insurance coverage

When bargaining unit members returned to work in February 2018, Respondent did not provide them with the paperwork needed to obtain health insurance. When this problem

⁶ To the extent that Graham testified that Respondent and the Union bargained to impasse about the terms under which bargaining unit employees would return to work in 2018, I do not credit that testimony. (See Tr. 287–292.) Putting aside some ambiguity about which negotiations Graham was addressing in his testimony (Graham was asked about negotiations that led to the 2016 memorandum of understanding, but appeared to drift into testifying about negotiations that preceded reopening the mine in 2018), there is no support for the proposition that the parties were at impasse and that Respondent implemented its final offer before resuming operations at the mine in February 2018. First, the 2016 memorandum of understanding was still in effect (until December 31, 2021), and there is no documentation showing that Respondent sought to reopen that memorandum for wages and/or healthcare. Second, as noted above, the re-opener option only applied to wages and healthcare; therefore, Respondent's proposal to negotiate an entirely new memorandum of understanding exceeded the scope of the re-opener option, and thus arguably did not create any bargaining obligations for the Union. See *St. Barnabas Medical Center*, 341 NLRB 1325, 1325 & fn. 2 (2004) (explaining that the proposal of a midterm contract modification does not impose a bargaining obligation). And third, the evidentiary record does not include any documents in which Respondent declared impasse or specified the terms of any final offer that it planned to implement (unilaterally) in 2018. (See Jt. Exh. 3, par. 5; Findings of Fact (FOF), Section II(A)(4), *supra*.)

persisted such that bargaining unit members did not have health insurance for several weeks, a bargaining unit member filed a grievance on March 31, 2018, to assert that Respondent was violating the terms of the NBCWA of 2016. Respondent assured the Union that it was working on obtaining health insurance for the bargaining unit. (Tr. 33-36, 56-57, 88-89, 132-133, 152-153; GC Exh. 3.)

2. Respondent enrolls employees in a health insurance plan different from the EIN plan

In about April 2018, Patrick Graham contacted Connie Vance and advised that the employees at Red Fox Mine did not have health insurance (Graham is Respondent's senior vice president for health, safety and human resources, while Vance is the director of benefits administration for the Justice Company).⁷ Graham asked Vance to provide health insurance applications to the employees as soon as possible, but did not tell Vance that employees at the mine were represented by a union, and also did not ask Vance to provide any specific health care plan to employees. Accordingly, Vance provided Graham with paperwork to enroll employees at the mine (including bargaining unit employees) in the health care plan that Justice Company employees used, and enrolled employees in that plan once the paperwork was completed. There is no evidence that Respondent notified the Union that Respondent would be providing health insurance was unlike the EIN plan, nor is there evidence that the Union agreed to such a change. (Tr. 36-38, 63-64, 89, 140-141, 163, 198, 241, 244-245, 261, 269, 294-295; CP Exh. 1 (health insurance plan used by the Justice Company); Jt. Exh. 3, pp. 3-4 (summary of benefits under the health insurance plan used by the Justice Company); Jt. Exh. 3, pars. 2, 5(d); see also Jt. Exh. 3, pars. 5(b)-(c) (noting that Respondent does not have any records of communications with the Union and/or bargaining unit members about health insurance plans in this timeframe); Tr. 90-91 (noting that Respondent's employees frequently filled out health insurance paperwork even when their health insurance was not changing); Tr. 295-296 (noting that Graham also advised Vance that employees' health insurance claims should be covered dating back to when they returned to work).)

3. Individual employees experience problems with health insurance

Later in the spring of 2018, individual bargaining unit employees began noticing that some of their health care expenses (such as copays and percentages paid for services) were different and attempted to address those issues by contacting Respondent directly. In addition, employee W.C. filed a grievance on May 19, 2018, to allege that Respondent was violating the NBCWA of 2016 by not providing health insurance coverage to his spouse (spouses had been covered in the past). (Tr. 37-39, 56-57, 134-135, 158; GC Exh. 7.)

D. June 2018 – Respondent Begins Paying Employees via Wire Transfer and Stops Providing Pay Statements on Pay Days

1. Wire transfers

In June 2018, Respondent asked bargaining unit employees to fill out paperwork to authorize Respondent to use direct deposit to pay wages and bonuses. Most if not all employees

⁷ Justice Energy is a division of the Justice Company. (Tr. 243.)

agreed to authorize direct deposit and accordingly filled out paperwork to provide Respondent with their bank account information.⁸ (Tr. 43, 74, 90, 98, 285–286.) There is no evidence that Respondent notified the Union about its plan to pay employees by direct deposit, nor is there evidence that the Union consented to such a plan.

On about June 28, 2018, Respondent began paying bargaining unit employees via wire transfer (instead of direct deposit as had been discussed). Respondent did not notify bargaining unit employees that it would be paying them by wire transfer instead of direct deposit. The wire transfers caused various problems for some members of the bargaining unit, including: delays in receiving payments until they selected a bank willing to accept wire transfers from Respondent; and wire transfer fees that their bank charged each time Respondent sent a wire transfer. In some instances (such as when Respondent used a wire transfer to pay an employee a small bonus), the wire transfer fee that the employee incurred exceeded the amount of the wire transfer. There is no evidence that Respondent notified the Union that Respondent would be paying bargaining unit employees by wire transfer instead of cash or check, nor is there evidence that the Union agreed to such a change. (Tr. 42–45, 54, 72–79, 83, 90, 97–101, 103–104, 145–146, 284; Jt. Exh. 3, pars. 1, 4(a); GC Exhs. 5–6 (examples of bank fees that bargaining unit employees incurred due to wire transfer payments from Respondent); see also Tr. 87 (noting that the wire transfer funds are immediately available for employees to use once the wire transfer is completed).)⁹

2. Pay statements

When Respondent began paying bargaining unit employees by wire transfer (on about June 28, 2018), Respondent stopped providing pay statements to bargaining unit employees with their pay. Instead, Respondent provided pay statements to employees at various times up to two or three weeks after the corresponding payday.¹⁰ There is no evidence that Respondent notified the Union that Respondent would be providing pay statements to bargaining unit employees days or weeks after the corresponding payday (instead of providing the statements with the employees' pay), nor is there evidence that the Union agreed to such a change. (Tr. 45–46, 80–81, 149, 282; Jt. Exh. 3, par. 4(b)–(d) (indicating that Respondent does not have any records showing contact with the Union about delivering pay statements, and does not have any records showing when it provided pay statements to employees before or after November 1, 2018).)

⁸ In discussions between the parties after the Union filed a grievance in December 2018 about Respondent's decision to pay employees by wire transfer, the Union noted that it did not object to Respondent paying employees by direct deposit if the employees agreed to that method of payment. The Union emphasized its view, however, that the contract required Respondent to pay employees by cash or check, and that Respondent would have to follow the contract language if an employee preferred payment by cash or check instead of direct deposit. (Tr. 144–146, 149–151.)

⁹ To the extent that bargaining unit employees notified Respondent of the problems related to being paid by wire transfer (including wire transfer fees that employees' banks charged and some employees' banks refusing to accept the wire transfers altogether), there is no evidence that Respondent addressed those problems. (Tr. 54–55, 81–85, 101, 145–146, 286–287.)

¹⁰ Graham acknowledged that Respondent delivered pay statements late on two occasions. Graham, of course, was only occasionally at the Red Fox Mine and was not responsible for delivering pay statements to bargaining unit employees. (Tr. 282–283, 299.) It is therefore not surprising that Graham was not aware of other instances in this timeframe where Respondent delivered pay statements late.

E. Summer/Fall 2018 – Ongoing Problems with Health Insurance

1. W.C.'s grievance about health care insurance coverage for his spouse

On July 20, 2018, Respondent (through Graham) and the Union agreed to settle W.C.'s grievance by having Respondent secure health insurance coverage for W.C.'s spouse. Respondent asked for 30 days to straighten things out and the Union agreed to that timetable. Respondent did not (at this time) tell the Union that W.C.'s spouse was not eligible for coverage under the terms of the new health insurance plan, but rather indicated that her lack of coverage was a mistake that would be corrected. (Tr. 39-40, 135-137, 160-161; GC Exh. 7.)

By fall 2018, it became apparent that Graham was not going to be able to secure health insurance coverage for W.C.'s spouse as contemplated in the grievance settlement. Thereafter, W.C. contacted Vance to discuss the issue and Vance explained W.C.'s spouse could not be covered under the Justice Company health insurance plan because W.C.'s spouse was eligible for health insurance from her own employer. Vance added that she could not deviate from the terms of the Justice Company health insurance plan because doing so would jeopardize the Justice Company's coverage for all of its employees. (Tr. 40, 134-135, 137-138, 245-247; see also CP Exh. 1, p. 25 (Justice Company health insurance plan language on eligibility of spouses for coverage); Jt. Exh. 3, p. 4 (same); Tr. 199-200.)

2. The Union learns that Respondent has implemented a different health insurance plan

On October 19, 2018, the Union sent an information request to Respondent to monitor compliance with the contract. As part of its request, the Union asked for a copy of the current health insurance plan and confirmation that premiums had been paid and were up to date. On October 29, 2018, Respondent provided information in response to the Union's request, including a copy of the Justice Company health insurance plan. (GC Exhs. 9-10; Tr. 141-144.)

In around the same timeframe in October 2018, union representatives spoke to Vance to follow up on W.C.'s grievance. When the Union stated that spouses had always been covered under Respondent's health insurance plan, Vance explained that Red Fox Mine employees (including bargaining unit employees) were now enrolled in the Justice Company health insurance plan based on the request that she received from Graham in April 2018. In a conversation with union representatives later in October 2018, after Vance obtained a copy of the 2015 EIN plan, Vance noted that it was possible to build a health care plan like the EIN plan with the assistance of a third-party administrator. Vance added, however, that (in her view) employees would be worse off if they switched to a plan like the EIN plan because the benefits were better under the Justice Company health insurance plan. (Tr. 138-139, 156-157, 247-249, 255-256, 264-265; but see Tr. 205 (Union witness disagreed with the proposition that the Justice Company plan is better than a health insurance plan like the EIN plan).)

3. Respondent provides a comparison of benefits under the EIN and Justice Company health insurance plans

On October 26, 2018, Vance emailed union representatives a side-by-side comparison that she prepared to show the differences between the EIN and Justice Company health insurance

plans. (Tr. 139–140, 247–248, 250–251; GC Exh. 8) Vance listed the following items in her comparison:

Benefit	EIN plan	Justice Company plan
Deductible	\$250 Individual \$500 Family	\$1500 Individual \$5000 Family
Out of Pocket Max	\$4500 Individual \$9200 Family	\$5000 Individual \$10000 Family
Out of Network Max	\$18000 Individual \$36000 Family	None ¹¹
Out of Network Deductible	\$750 Individual \$1500 Family	None
Coinsurance/Health Plan Payment Percentages	20% Coinsurance 80% Health Plan	20% Coinsurance 80% Health Plan
Copays	\$15 Primary Care Physician \$15 Urgent Care [Specialist not listed] \$75 Emergency Room	\$30 Primary Care Physician \$30 Urgent Care \$50 Specialist \$100 Emergency Room
Maximum Out of Pocket (Prescriptions)	\$2000 Individual \$4000 Family	Included in Out of Pocket Max
Maximum Prescription Out of Pocket Out of Network	\$18000 Individual \$36000 Family	Included in Out of Pocket Max
Prescription Copays	Generic - \$10 minimum or 30% of cost Tier 2 - \$10 minimum or 30% of cost Tier 3 - \$10 minimum or 30% of cost Tier 4 – 30% or \$300	Generic - \$10 or cost if lower Tier 2 - \$25 or cost if lower Tier 3 - \$40 or cost if lower Tier 4 – 25% up to \$150

- 5 (GC Exh. 8; Tr. 202–204, 251–255; see also GC Exh. 2 (summary of EIN plan); CP Exh. 1 (Justice Company plan); Jt. Exh. 3, pp. 3–4 (summary of Justice Company plan); Tr. 259–260, 270–271 (noting that Vance’s comparison was not exhaustive). The Union filed an unfair labor practices charge on November 15, 2018, to contest (among other things) Respondent’s decision to enroll bargaining unit employees in a different health insurance plan. (GC Exh. 1(a).)

¹¹ The EIN plan uses a preferred provider network. The Justice Company plan, by contrast, does not have a provider network. Instead, employees may receive medical treatment from any provider and the Justice Company plan will pay the provider the Medicare rate for the service plus an additional 50 percent (i.e., if the Medicare rate is \$100, the plan will pay \$150). If the Justice Company plan’s payment and the employee’s standard payment do not fully resolve the provider’s charges, a situation may arise where the provider bills the employee for the balance of the charges (balance billing). An employee who receives a balance bill may take the initiative to contact Respondent or the Justice Company plan about paying the additional amount on the balance bill (the employee also might resolve the bill on their own without notifying one of those entities). Respondent and/or the Justice Company plan have resolved balance bills for certain employees, though the evidentiary record does not show how smoothly or consistently the balance bill resolution process works (and it would have been beyond the scope of this case to explore that process extensively). (Tr. 219–225, 254, 267–268, 306–314.)

During trial, the Union agreed that the Justice Company plan is an 80/20 plan. Union director of research and collective-bargaining Brian Sanson also noted that to comply with the Affordable Care Act the EIN plan would need to be updated to specify only one out of pocket maximum instead of having separate maxima for health care coverage and prescription drug coverage.¹² (Tr. 158, 203–204, 211.)

F. Additional Developments with Wire Transfers and Pay Statements

On about December 2, 2018, the Union filed a grievance to assert that Respondent was violating the NBCWA of 2016 by: not paying bargaining unit employees by cash or check; and not providing pay statements. Graham responded that he had no authority to settle issues relating to the wire transfers and added that he had no control over whether pay statements were provided to employees on time. The Union subsequently withdrew the grievance on March 8, 2019, because it would be litigating the disputed issues in this case. (GC Exh. 11; Tr. 56, 63, 144–148.) There is no evidence that Respondent and the Union had any written communication about wire transfers and/or pay statements beyond the correspondence referenced here concerning the grievance. (Jt. Exh. 3, par. 4(a).)

In about January/February 2019, Respondent improved its timing with delivering pay statements, such that Respondent generally began distributing pay statements in the evening on payday. If an employee was off duty when Respondent distributed pay statements then the employee would receive his or her statement on their next day of work. (Tr. 46–47, 81, 281–282; see also R. Exh. 2 (example pay statement dated October 9, 2019).)

DISCUSSION AND ANALYSIS

A. Applicable Legal Standards

1. Witness credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

¹² Sanson also identified various coverage limitations and exclusions in the Justice Company plan, as well as language that gives Respondent the right to amend or terminate the plan at its discretion. The Union did not negotiate any of those terms. (See Tr. 200–202 (discussing CP Exh. 1, pp. 41–42, 44, 59).) The evidentiary record does not show, however, whether the EIN plan has similar or different provisions on those topics.

2. Unlawful contract modification

In a “contract modification” case, “the General Counsel must show a contractual provision, and that the employer has modified the provision” without the union’s consent.¹³ *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), enfd. 475 F.3d 14 (1st Cir. 2007). Where the issue in dispute turns on the resolution of two conflicting interpretations of the collective-bargaining agreement, the Board will not find a violation if the employer has a sound arguable basis for its interpretation of the agreement and is not motivated by union animus or acting in bad faith. *Id.* at 502; see also *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 3, 9 (2019) (explaining that applying the “sound arguable basis” standard encourages employers and unions to resolve disputes themselves, and if they cannot, to resort to arbitration); *American Electric Power*, 362 NLRB 803, 805 (2015) (noting that in the absence of evidence of bad faith, animus or an intent to undermine the union, the Board does not seek to determine, in a contract interpretation dispute, which of two equally plausible contract interpretations is correct).

In interpreting a collective-bargaining agreement to evaluate the basis of an employer’s contractual defense, the Board gives controlling weight to the parties’ actual intent underlying the contractual language in question. To determine the parties’ intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017); *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994).

B. Did Respondent Violate the Act by Implementing a Health Insurance Plan that is Inconsistent with the Applicable Contracts?

1. Complaint allegation

The General Counsel alleges Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by on about February 20, 2018, and not reasonably discoverable by the Union until late October 2018, without the Union’s consent

¹³ The Board has explained that the unilateral change and contract modification theories are mutually exclusive, such that the judge should analyze alleged misconduct under only one of the theories. If the dispute relates to a contractual matter that is covered by the parties’ collective-bargaining agreement, then the contract modification theory applies and the unilateral change theory does not. By contrast, a unilateral change case arises where there is an employment practice concerning a mandatory bargaining subject and the employer makes a significant change to that practice without bargaining. *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 6–7 (2019) (explaining that if an employer modifies a collective-bargaining provision without the union’s consent, then the employer’s act is unlawful under the contract modification theory even if the employer had given the union notice and an opportunity to bargain); see also *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005) (explaining that the “unilateral change” theory and the “contract modification” theory “are fundamentally different in terms of principle, possible defenses, and remedy”), enfd. 475 F.3d 14 (1st Cir. 2007). The contract modification theory that is alleged in the complaint is the appropriate theory here, as each complaint allegation relates to a contract provision that Respondent allegedly modified without the Union’s consent.

failing to continue in effect all the terms and conditions of the NBCWA of 2016 by substantially and materially changing the bargaining unit's health insurance benefit plan.

2. Analysis

The evidentiary record shows that Respondent and the Union are bound by both the NBCWA of 2016 and by the terms of any memoranda of understanding that they negotiate and execute to supplement or modify the NBCWA. On December 30, 2016, Respondent and the Union executed a memorandum of understanding that stated as follows concerning health insurance for bargaining unit employees:

Justice Energy shall provide all active and laid off employees with a healthcare and prescription drug coverage plan as that which is established in the 2015 EIN 80/20 plan (see attachment). The Dental, Vision and Accidental Health and Dismemberment Plans shall be identical to those established in Article XX and Article XXA of the 2016 NBCWA.

(FOF, Section II(A) (noting that the 2015 EIN 80/20 plan summary was available to the parties but was not attached to the copy of the 2016 memorandum of understanding that was circulated for signature).

On February 20, 2018, Respondent reopened the Red Fox Mine, with bargaining unit employees returning to work under the 2016 NBCWA and the 2016 memorandum of understanding. Respondent, however, did not set up health insurance benefits for bargaining unit employees, and addressed that problem in April 2018 by enrolling employees in the Justice Company health insurance plan but without first notifying the Union or obtaining the Union's consent. The benefits under the Justice Company health insurance plan are substantially different from the benefits under the 2015 EIN 80/20 plan. The Union did not learn until October 2018 that Respondent enrolled bargaining unit employees in the Justice Company health insurance plan, and filed an unfair labor practice charge to contest that issue on November 15, 2018. (FOF, Section II(B), (C)(1)–(2), (E)(2)–(3).)

a. The complaint allegation is not time barred under Section 10(b)

Under Section 10(b) of the Act, “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy [of the charge] upon the person against whom such charge is made.” The fundamental policies underlying the 10(b) period are to: bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused; and to stabilize existing bargaining relationships. *A & L Underground*, 302 NLRB 467, 468 (1991) (citing *Bryan Manufacturing Co. v. NLRB*, 362 US 411, 419 (1960)).

It is well-settled that the 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act. Either actual or constructive notice of the alleged unfair labor practice may be sufficient to start the 10(b) period, although constructive notice must be predicated on a showing that the charging party failed to exercise reasonable diligence (i.e., that

the charging party would have discovered the alleged unfair labor practice in the exercise of reasonable diligence). *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *R. G. Burns Electric*, 326 NLRB 440, 440-441 & fn. 4 (1998). An unfair labor practice charge will not be time-barred if the delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party. *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2 (2017); *Concourse Nursing Home*, 328 NLRB at 694. The burden of showing clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b). *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2; *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

I am not persuaded by Respondent's argument that the complaint allegation about the health insurance plan is time-barred under Section 10(b) of the Act. (See R. Posttrial Br. at 7-8.) The evidentiary record shows that Respondent enrolled bargaining unit employees in the Justice Company health insurance plan without the Union's knowledge or consent, and the Union did not learn about that decision until October 2018. To be sure, the Union did assist certain individual employees who experienced problems with health care coverage before October 2018, but in that timeframe Respondent characterized the problems as mistakes that could be corrected instead of as outcomes determined by language in the new health insurance plan. (See FOF, Section II(C)(3), (E)(1) (discussing W.C.'s May 2018 grievance about whether his spouse could be covered under Respondent's health insurance plan).) Under those circumstances, I do not find that the Union had actual or constructive notice that Respondent enrolled bargaining unit employees in the Justice Company health insurance plan until October 2018, when Respondent (through Vance) specifically advised the Union of that fact. Accordingly, Respondent's Section 10(b) defense fails, since the Union filed its unfair labor practices charge on November 15, 2018, less than six months after the Union received notice that Respondent changed bargaining unit employees' health insurance.

b. Respondent unlawfully modified the health insurance provisions of the 2016 memorandum of understanding without the Union's consent

I also find that Respondent did not abide by the health insurance provisions of the 2016 memorandum of understanding. The 2016 memorandum required Respondent to implement a health care and prescription drug coverage plan like the 2015 EIN 80/20 plan – indeed, that is what the parties specified with the (somewhat inartful) memorandum language stating that Respondent “shall provide . . . a healthcare and prescription drug coverage plan as that which is established in the 2015 EIN 80/20 plan.”¹⁴ In Respondent's haste to set up health insurance for bargaining unit employees after the mine resumed operations in 2018, Respondent overlooked

¹⁴ My finding on this point is supported by the fact that: (a) the Union and Respondent did not simply copy the health insurance paragraph from the 2015 memorandum of understanding (which explicitly stated that the health insurance plan would be the EIN plan) into the 2016 memorandum; instead, they agreed on the revised language that I have referenced here; and (b) the Union and Respondent used clear language in the 2016 memorandum when they agreed on a specific plan or requirement, such as when they stated that the dental, vision and accidental health and dismemberment plans “shall be identical” to those established in the NBCWA of 2016. (See FOF, Section II(A)(4); cf. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 21 (2019) (finding that, based on various provisions of the parties' agreement, the parties knew how to use contract language to identify which categories of employees were eligible for particular benefits).)

the health care provisions of the 2016 memorandum and enrolled bargaining unit employees in the Justice Company health insurance plan.

Notably, Respondent agrees that the 2016 memorandum of agreement requires it to provide an 80/20 health insurance plan like the 2015 EIN 80/20 plan. Respondent maintains, however, that it complied with that requirement when it enrolled bargaining unit employees in the Justice Company health insurance plan. (See R. Posttrial Br. at 4-7.) I do not find that argument (which is similar to a sound arguable basis defense) to be persuasive. While the Justice Company plan is, at a basic level, an 80/20 health insurance plan, Respondent carries its argument too far when it argues that the Justice Company plan is like the 2015 EIN 80/20 plan. The evidentiary record demonstrates that the two plans have several significant differences, including but not limited to:

Spousal coverage:	EIN plan covers spouses; Justice Company plan does not cover spouses who can obtain coverage from their own employer;
Deductibles:	Different amounts specified in each plan;
Copays:	Different amounts specified in each plan;
Out of Pocket Maxima:	Different amounts specified in each plan; and
Provider Network:	EIN plan has a provider network while the Justice Company plan does not.

Given the explicit directive in the 2016 memorandum of understanding that Respondent must provide a health insurance plan like the 2015 EIN 80/20 plan, it is not plausible that the parties intended to permit Respondent to implement, without the Union's consent, any 80/20 health insurance plan without regard to whether the plan had coverage and benefits that are similar to the 2015 EIN 80/20 plan. Moreover, in light of the significant differences between the 2015 EIN 80/20 plan and the Justice Company plan I find that the Justice Company plan does not satisfy the health insurance plan requirements stated in the 2016 memorandum of understanding. Accordingly, I do not find that Respondent had a sound arguable basis for believing that the 2016 memorandum of understanding permitted it to enroll bargaining unit employees in the Justice Company health insurance plan without the Union's consent.¹⁵ *Hospital San Carlos Borromeo*, 355 NLRB 153, 153 (2010) (rejecting the employer's sound arguable basis defense to a contract modification allegation because the employer's interpretation of the contract language was implausible).

In sum, I find that since about February 20, 2018, Respondent unlawfully modified the 2016 memorandum of understanding without the Union's consent by substantially and materially

¹⁵ In this connection, I note that the evidentiary record establishes that it would have been possible for Respondent to build a health insurance plan like the 2015 EIN 80/20 plan. I also note that the contract language provided Respondent with enough flexibility to build a health insurance plan that was like the 2015 EIN 80/20 plan but also fully compliant with the Affordable Care Act (which, according to witness testimony, does not permit health insurance plans to specify different out of pocket maxima for health care coverage and prescription drug coverage). (See FOF, Section II(E)(3).) Finally, I note that it does not matter whether the Justice Company plan is better than the 2015 EIN 80/20 plan (a debatable point) – the 2016 memorandum of understanding required Respondent to provide a health care plan like the 2015 EIN 80/20 plan, and Respondent departed from that requirement without the Union's consent.

changing the bargaining unit's health insurance benefit plan, and thereby violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.¹⁶

C. Did Respondent Violate the Act by Paying Bargaining Unit Employees by Wire Transfer Instead of by Cash or Check?

1. Complaint allegation

The General Counsel alleges Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by in about June 2018, without the Union's consent failing to continue in effect all the terms and conditions of the NBCWA of 2016 by commencing the practice of paying employees by wire and causing some employees to incur a wire transfer fee.

2. Analysis

The NBCWA of 2016 expressly requires Respondent to pay bargaining unit employees by cash or check. Between February 20 and about June 27, 2018, Respondent complied with that contractual provision by paying bargaining unit employees by check. On about June 28, 2018, however, Respondent began using wire transfers to pay bargaining unit employees their wages and bonuses. The Union did not consent to this new payment method. The evidentiary record shows that some members of the bargaining unit incurred wire transfer fees (charged by their banks) for every wire transfer that Respondent sent to them on or after June 28, 2018. (FOF, Section II(A)(3), (B), (D)(1).)

I find that Respondent did not abide by the terms of the NBCWA of 2016 when Respondent began paying bargaining unit employees by wire transfer. The NBCWA of 2016 explicitly calls for employees to be paid by cash or check, and a wire transfer is not either of those methods. Further, Respondent did not obtain the Union's consent before changing its method for paying bargaining unit employees.¹⁷ Accordingly, I find that since about June 28,

¹⁶ Technically, the General Counsel should have amended the complaint to identify the 2016 memorandum of understanding as the relevant contract that Respondent modified (instead of the NBCWA of 2016). Respondent was not prejudiced by that oversight, however, because the parties fully litigated the question of whether Respondent modified the terms of the 2016 memorandum, and because there is no dispute that the NBCWA of 2016 and the 2016 memorandum of understanding operate together to establish the terms and conditions of employment for the bargaining unit.

¹⁷ Respondent's arguments concerning these points lack merit. First, Respondent maintains that its wire transfer payments to bargaining unit employees complied with the NBCWA because wire transfers are equivalent to cash. (See R. Posttrial Br. at 8-9.) That argument fails because cash has a plain meaning: legal tender in the form of bills or coins. To illustrate, if a restaurant is "cash only" it will accept a ten-dollar bill or quarters, but will not accept a wire transfer regardless of how quickly such a transfer might appear in the restaurant's bank account (if it has one). There is no sound arguable basis for Respondent to believe that paying employees by wire transfer would satisfy the contractual requirement to pay bargaining unit employees by cash or check. *Hospital San Carlos Borromeo*, 355 NLRB at 153 (explaining that an implausible interpretation of contract language will not establish the sound arguable basis defense).

Second, Respondent maintains that the Union "was aware of the change to electronic payments and did not object," and suggests that this means that the Union consented to the wire transfers. (R. Posttrial

2018, Respondent unlawfully modified the NBCWA of 2016 without the Union's consent by paying bargaining unit employees by wire transfer instead of by cash or check (causing some bargaining unit employees to incur wire transfer fees), and thereby violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

D. Did Respondent Violate the Act by not Issuing Pay Statements to Bargaining Unit Employees with Their Pay?

1. Complaint allegation

The General Counsel alleges Respondent violated Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act, by in about November 2018, without the Union's consent failing to continue in effect all the terms and conditions of the NBCWA of 2016 by failing to issue employees a plain statement at the time employees received their paychecks.

2. Analysis

The NBCWA of 2016 expressly requires Respondent to provide, with each bargaining unit member's pay, a "plain statement" that itemizes the number of hours worked during the pay period and all payroll deductions. Between February 20 and about June 27, 2018, Respondent complied with that contractual provision by providing bargaining unit employees with a pay statement that accompanied each paycheck. On about June 28, 2018, however, Respondent began providing pay statements to bargaining unit employees up to two to three weeks after the corresponding payday. The Union did not consent to this new schedule for providing pay statements. Respondent continued its practices with the timing of pay statements until about January or February 2019, at which time Respondent generally began making pay statements available to bargaining unit employees in the evening of the corresponding payday. (FOF, Section II(A)(3), (B), (D)(2), (F).)

I find that Respondent did not abide by the terms of the NBCWA of 2016 when, starting on about June 28, 2018, Respondent stopped providing pay statements to bargaining unit employees with their pay. Respondent does not dispute that the NBCWA requires it to provide pay statements to bargaining unit employees with their pay (see R. Posttrial Br. at 9), and I find that Respondent's practice of waiting up to two or three weeks to provide pay statements (starting on about June 28, 2018) did not comply with that contractual requirement. To the extent that Respondent may have substantially corrected the problem by January/February 2019, that development is relevant only to the scope of the remedy for violating the Act.

Br. at 9.) In making this argument, Respondent relies on the fact that bargaining unit employees filled out forms to authorize payment by direct deposit and maintains that the employees' actions should be imputed to the Union. Respondent's argument misses the mark because: (a) Respondent, in somewhat of a bait-and-switch, did not set up direct deposit and instead used the information on bargaining unit employees' direct deposit forms to set up wire transfers; and more important (b) the bargaining unit employees' actions in filling out direct deposit forms fall well short of any actual consent by the Union to modify the explicit terms of the NBCWA of 2016 to permit Respondent to pay employees by wire transfer.

Based on the facts before me, I find that since about November 1, 2018,¹⁸ Respondent unlawfully modified the NBCWA of 2016 without the Union's consent by failing to issue bargaining unit employees a pay statement (also referred to as a plain statement) with their pay, and thereby violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, since about February 20, 2018, unlawfully modifying the 2016 memorandum of understanding without the Union's consent by substantially and materially changing the bargaining unit's health insurance benefit plan, Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

4. By, since about June 28, 2018, unlawfully modifying the NBCWA of 2016 without the Union's consent by paying bargaining unit employees by wire transfer instead of by cash or check (causing some bargaining unit employees to incur wire transfer fees), Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

5. By, since about November 1, 2018, unlawfully modifying the NBCWA of 2016 without the Union's consent by failing to issue bargaining unit employees a pay statement (also referred to as a plain statement) with their pay, Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

6. The unfair labor practices stated in conclusions of law 3-5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully modified the 2016 memorandum of understanding and the NBCWA of 2016 without the Union's consent (by substantially and materially changing the health insurance plan, paying bargaining unit employees by wire transfer and not providing pay statements with bargaining unit employees' pay), I shall order Respondent to restore the status quo ante and to continue in effect all terms and conditions of employment

¹⁸ Although Respondent began delivering pay statements late on about June 28, 2018, I have held the General Counsel to the November 2018 timeframe that the amended complaint specifies for the start of the violation. (See GC Exh. 1(l), par. 8.)

contained in the 2016 memorandum of understanding and the NBCWA of 2016 unless the Union consents to modifications.

I shall also order Respondent to make bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful actions. Make whole relief shall include compensating bargaining unit employees for: (a) additional health care expenses that bargaining unit employees paid as a result of being enrolled in a health insurance plan that did not comply with the terms of the 2016 memorandum of understanding (i.e., the difference, if any, between what employees paid for health care expenses under the Justice Company plan and what employees would have paid for health care expenses had they been in a health insurance plan like the 2015 EIN 80/20 plan); and (b) any additional fees that bargaining unit employees incurred from their financial institutions for receiving wire transfers from Respondent.¹⁹ See *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal law and the law of the state of West Virginia.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 9 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

Respondent, Justice Energy, Inc., McDowell County, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹⁹ In ordering this remedy, I note that I have considered and rejected Respondent's argument that it should not have to compensate bargaining unit employees for wire transfer fees imposed by the employees' financial institutions. (See R. Posttrial Br. at 9.) I find that it is appropriate to require Respondent to reimburse bargaining unit employees for wire transfer fees because those expenses resulted directly from Respondent's unlawful decision to pay employees by wire transfer instead of by cash or check.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Modifying the 2016 memorandum of understanding without the Union's consent by substantially and materially changing the bargaining unit's health insurance benefit plan.

(b) Modifying the NBCWA of 2016 without the Union's consent by paying bargaining unit employees by wire transfer instead of by cash or check (causing some bargaining unit employees to incur wire transfer fees).

(c) Modifying the NBCWA of 2016 without the Union's consent by failing to issue bargaining unit employees a pay statement (also referred to as a plain statement) with their pay.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Abide by the terms of the 2016 memorandum of understanding by providing bargaining unit employees a healthcare and prescription drug coverage plan that is consistent with the terms of the 2016 memorandum of understanding unless the Union consents to modifications.

(b) Make bargaining unit employees whole, in the manner set forth in the remedy section of this decision, for any loss of earnings and other benefits that they suffered, as well as for any additional health care expenses that they paid, as a result of Respondent's unlawful failure to provide a healthcare and prescription drug coverage plan consistent with the terms of the 2016 memorandum of understanding.

(c) Abide by the terms of the NBCWA of 2016 by paying bargaining unit employees by cash or check, and by issuing bargaining unit employees a pay statement (also referred to as a plain statement) with their pay unless the Union consents to modifications.

(d) Make bargaining unit employees whole, in the manner set forth in the remedy section of this decision, for any loss of earnings and other benefits that they suffered, as well as for any financial institution fees that they paid, as a result of Respondent's unlawful decision to pay them by wire transfer instead of by cash or check as required by the terms of the NBCWA of 2016.

(e) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in McDowell County, West Virginia, copies of the attached notice marked "Appendix."²¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since February 20, 2018.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., December 12, 2019.



Geoffrey Carter
Administrative Law Judge

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT modify the 2016 memorandum of understanding without the Union's consent by substantially and materially changing the bargaining unit's health insurance benefit plan.

WE WILL NOT modify the NBCWA of 2016 without the Union's consent by paying bargaining unit employees by wire transfer instead of by cash or check (causing some bargaining unit employees to incur wire transfer fees).

WE WILL NOT modify the NBCWA of 2016 without the Union's consent by failing to issue bargaining unit employees a pay statement (also referred to as a plain statement) with their pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL abide by the terms of the 2016 memorandum of understanding by providing bargaining unit employees a healthcare and prescription drug coverage plan consistent with the terms of the 2016 memorandum of understanding unless the Union consents to modifications.

WE WILL make bargaining unit employees whole for any loss of earnings and other benefits that they suffered, as well as for any additional health care expenses that they paid, as a result of our unlawful failure to provide a healthcare and prescription drug coverage plan consistent with the terms of the 2016 memorandum of understanding.

WE WILL abide by the terms of the NBCWA of 2016 by paying bargaining unit employees by cash or check, and by issuing bargaining unit employees a pay statement (also referred to as a plain statement) with their pay unless the Union consents to modifications.

WE WILL make bargaining unit employees whole for any loss of earnings and other benefits that they suffered, as well as for any financial institution fees that they paid, as a result of our

unlawful decision to pay them by wire transfer instead of by cash or check as required by the terms of the NBCWA of 2016.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

JUSTICE ENERGY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/09-CA-231106 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.